



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105**

Christa Westerberg
Pines Bach LLP
122 W. Washington Avenue, Ste 900
Madison, WI 53703

Re: Freedom of Information Act (FOIA) Request EPA-R9-2020-004741

Dear Christa Westerberg:

This letter is in reference to your above-referenced FOIA request in which you requested the following records:

On behalf of Friends of the Black River Forest, this request seeks certain records related to the recent civil action brought against Kohler Co. by the United States and State of California, Northern District of California Case Number 4:20-cv-00683-PJH. Specifically, this request seeks, 1) communications between the U.S. EPA and any official or representative of the State of California related to the allegations that "Kohler was aware that the Subject Engines operated at speeds substantially above 3,060 rpm in real-world operation" and that "Kohler 'knew or should have known' that the fueling strategy in the Subject Calibration bypassed, defeated, or rendered inoperative an emission control strategy because it was designed to maximize emissions performance during certification testing even though it was not representative of the in-use operation," and 2) communications between the U.S. EPA and any representative or agent of Kohler Co. related to the same allegations stated in #1, above. These allegations are contained in paragraphs 88 and 89 of the complaint in the above-referenced case.

We are willing to discuss appropriate search terms to most effectively and efficiently obtain the requested records. They may include "Kohler," "emissions cheating," "defeat device," and "knowingly."

On June 17, 2020, we discussed ways to clarify and narrow your request and the additional time we would need for processing your request. You agreed to revise your request as follows:

- (1) For item 1, limit the search to emails between EPA and the California Air Resources Board (CARB) that did not include any EPA or CARB attorneys (to exclude potential attorney-client communications and attorney work product) for purposes of obtaining pre-case analytics on potential record volumes (the search terms used will be disclosed along with the pre-case analytics) and then have further discussions about potentially narrowing item 1 further, if appropriate.

- (2) For item 2, exclude email communications between EPA and any representative or agent of Kohler, but include letters, PowerPoint presentations, and any other potentially responsive documents; and include copies of EPA's information requests sent to Kohler, but exclude Kohler's responses to those information requests.
- (3) You also asked for Kohler's initial self-disclosure letters sent to EPA.

In our June 25, August 13, and September 18, 2020 correspondence, we provided you with the additional timeframes needed for processing the request and an update on the status of this response.

EPA has concluded its search for records responsive to your request and is providing a portion of the requested records. To access the records, reference your request as EPA-R9-2020-004741.

EPA is withholding approximately 20 records in full of the responsive records you requested because they are exempt from mandatory disclosure by virtue of 5 U.S.C. § 552(b)(7)(A) and (E) (law enforcement proceeding and law enforcement techniques and procedures). The attached index of withholding by categories as provided in 40 C.F.R. § 2.104(i)(2) provides further information concerning the records withheld in full.

EPA has determined that some of the records you requested may contain Proprietary Business Information/Confidential Business Information which are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(4). Pursuant to 40 C.F.R. § 2.204(d)(1), your request is being initially denied because further inquiry by EPA is required before a final determination can be made. We will consult with the third party in connection with the Proprietary Business Information/Confidential Business Information covering the records involved and the Office of Regional Counsel must issue a final confidentiality determination.

This letter concludes our response to your request. As noted above, the information withheld under Exemption 4 will be sent to the appropriate legal office which will issue a final confidentiality determination. Therefore, you do not need to appeal the withholding of information pursuant to Exemption 4. Once the legal office issues a final confidentiality determination, EPA will notify you whether the information qualifies for confidential treatment or may be released.

To the extent you would like to appeal any other issue, including any non-Exemption 4 withholdings, you may appeal this response by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

Your appeal must be in writing, and it must be received no later than 90 calendar days from the date of this letter. The Agency will not consider appeals received after the 90-calendar-day limit. Appeals received after 5:00 p.m. EST will be considered received the next business day. The appeal letter should include the FOIA tracking number listed above. For quickest possible handling, the subject line of your email, the appeal letter, and its envelope, if applicable, should be marked "Freedom of Information Act Appeal."

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. You may also

seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769. For all media inquiries, please contact press@epa.gov.

Please contact Ryan Bickmore at bickmore.ryan@epa.gov or (303) 312-6502 or Gretchen Busterud at busterud.gretchen@epa.gov or (415) 972-3903 if you have any questions.

Sincerely,

Amy C. Miller-Bowen
Director, Enforcement & Compliance Assurance Division

Attachment

Document Description	Basis for Exemption	FOIA Exemption Number
<p>Kohler's initial self-disclosure letters sent to EPA on December 24 and 31, 2015, claimed by Kohler as containing Confidential Business Information</p> <p>Approximately 2 documents.</p>	<ul style="list-style-type: none"> Confidential Business Information (CBI) Law Enforcement Proceeding 	<p>Exemption 4</p> <p>Exemption 7(A)</p>
<p>Communications between EPA and Kohler between April 4, 2016, to May 2, 2019, that discuss or reflect information related to the allegations that Kohler was aware that the Subject Engines operated at speeds substantially above 3,060 rpm in real-world operation and that Kohler knew or should have known that the fueling strategy in the Subject Calibration bypassed, defeated, or rendered inoperative an emission control strategy because it was designed to maximize emissions performance during certification testing even though it was not representative of the in-use operation claimed by Kohler as containing Confidential Business Information</p> <p>Approximately 18 documents</p>	<ul style="list-style-type: none"> Confidential Business Information (CBI) Law Enforcement Proceeding Law Enforcement Techniques and Procedures 	<p>Exemption 4</p> <p>Exception 7(A)</p> <p>Exemption 7(E)</p>